JAMALUDDIN OTHMAN

v.

MENTERI HAL EHWAL DALAM NEGERI, MALAYSIA & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
ANUAR ZAINAL ABIDIN J
[FEDERAL TERRITORY CRIMINAL APPLICATION NO. CR 54-18-88]
28 OCTOBER 1988

CONSTITUTIONAL LAW: *Habeas corpus - Applicant detained for practising and propagating his religion - Detained under s. 8(1) of Internal Security Act - Whether grounds of detention fall within scope of Internal Security Act - Federal Constitution, arts. 11, 149.*

The applicant was detained pursuant to an order made under s. 8(1) of the Internal Security Act 1960 (ISA). The grounds for his detention was that he had participated in activities of propagating Christianity to the Malays from 1985 to his detention on 27 October 1987 and that these activities could lead to a tense situation between the Muslims and the Christians in the country and were prejudicial to the security of the country. The applicant applied to the High Court for an order that a writ of *habeas corpus* be issued to direct the respondents to produce the applicant in the High Court and to show cause why he should not be set at liberty forthwith. He contended that his activities to practise and propagate Christianity are not prohibited under the Law but in fact guaranteed under Article 11 of the Federal Constitution. He further contended that the ISA which was enacted pursuant to Article 149 is therefore inconsistent with Article 11 and not valid. The Senior Federal Counsel on behalf of the respondents argued that since the Minister of Home Affairs had been satisfied that the applicant's act is prejudicial to the security of the country, that decision cannot be challenged in Court.

Held:

[1] While the allegations of fact upon which the subjective satisfaction of the Minister is based are not open to challenge or judicial review, it is open to the Courts, in determining the validity of any order of preventive detention, to consider whether the grounds of the detention fall within the scope of law under which the order was made.

[2] Under Article 149 any provision in the ISA designed against action prejudicial to national security is declared valid notwithstanding that it is inconsistent with Artcles 5, 9 or 10. It is therefore clear that any provision in the ISA which is inconsistent with Article 11 shall not be valid.

[3] Although the power given to the Minister under s. 8(1) of the ISA is wide it must be exercised within the scope of Article 149. The Minister has no power to deprive a person of his right to profess and practise his religion which is guaranteed under Article 11. If the Minister acts to restrict the freedom of a person from professing and practising his religion, his act will be inconsistent with Article 11 and therefore any order of detention would not be valid.

[4] In this case it is obvious that the grounds of the applicant's detention are outside the scope of Article 149 and consequently the order of detention upon the grounds inconsistent with Article 11 is outside the purview of the ISA and therefore not valid. The application is therefore allowed.

[Application allowed.]

Case referred to:
Minister for Home Affairs, Malaysia & Anor. v. Karpal Singh [1988] 3 MLJ 29

Legislation referred to:
Federal Constitution, art. 11
Internal Security Act 1960, s. 8(1)

For the applicant - Lee Min Choon; M/s. Lee, Perara & Tan
For the 1st and 2nd respondents - Mohd. Raus Shariff, DPP, Attorney General's Chambers

JUDGMENT

Anuar Zainal Abidin J:

This is an application by the applicant for an order that a writ of *habeas corpus* be issued to direct the respondent to produce the applicant before this Court and to show cause as to why the applicant should not be set at liberty forthwith on the grounds shown in the affidavit in support thereof.

The applicant was detained pursuant to an order made under s. 8(1) of the Internal Security Act 1960.

Pursuant to the requirement under s. 11(2)(b) of the said Act the applicant was served with a statement of the grounds on which the order is made. The statement is in the following terms:

> *Alasan-Alasan Untuk Perintah Tahanan*
>
> Bahawa kamu, Jamaluddin bin Othman @ Yeshua Jamaluddin, sejak tahun 1985 hingga ditangkap pada 27 Oktober 1987, telah melibatakan diri dalam satu rancangan untuk menyebarkan agama Kristian di kalangan orang-orang Melayu. Kegiatan kamu itu boleh mendorong kepada timbulnya suasana ketegangan dan permusuhan di antara masyarakat Islam dengan masyarakat Kristian di negegra ini dan boleh memudhratkan keselamatan negara.

It is settled law that it is open to the Courts, in determining the validity of any order of preventive detention, to consider whether the grounds of the detention fall within the scope of the law as the preventive detention under which the order professes to be made. In the case of *Minister for Home Affairs, Malaysia & Anor. v. Karpal Singh* [1988] 3 MLJ 29 at 31. Abdul Hamid, Ag. Lord President said in his judgment:

> With all due respect to the learned Judge, he would seem to have failed to distinguish between grounds of detention stated in the detention order and the allegations of fact supplied to the detainee. In particular he failed to recognise that whilst the grounds of detention stated in the detention order are open to challenge or judicial review if alleged to be not within the scope of the enabling legislation, the allegations of fact upon which the subjective satisfaction of the Minister was based are not.

The grounds stated in the order clearly refer to the applicant's activities to practise and propagate Christianity. The applicant contended that such activities are not prohibited under the law. In fact under the Federal Constitution a person is guaranteed freedom of religion. Under cl. (1) of Article 11 of the Constitution a person has the right to profess and practise his own religion. State law may however control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam. At the relevant time there was no such law prohibiting such propagation.

The applicant contended that the detention is bad in law in that it is inconsistent with the provision of Article 11 of the Constitution.

It was contended that the Internal Security Act 1960, which is an Act enacted pursuant to Article 149 of the Constitution is therefore inconsistent with the provision of Article 11 and not valid.

Under Article 149 of the Constitution any provision in the Internal Security Act designed against action prejudicial to national security is declared valid notwithstanding that it is inconsistent with any provision of Articles 5, 9 or 10 of the Constitution. It is therefore clear that any provision in the Internal Security Act which is inconsistent with the provision of Article 11 of the Constitution shall not be valid.

The Minister has issued an order of detention under s. 8(1) of the Internal Security Act. Section 8(1) reads as follows:

> 8. (1) If the Minister is satisfied that the detention of any person is necessary with a view to preventing him from acting in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof, he may make an order (hereinafter referred to as a detention order) directing that that person be detained for any period not exceeding two years.

The power given to the Minister under this section is wide. However it must be exercised within the scope provided under Article 149 of the Constitution.

Although under s. 8(1) of the Internal Security Act the Minister may detain a person with a view to preventing that person from "acting in any manner" prejudicial to the security of Malaysia, I am of the view the Minister has no power to deprive a person of his right to profess and practise his religion which is guaranteed under Article 11 of the Constitution. If the Minister acts to restrict the freedom of a person from professing and practising his religion, his act will be inconsistent with the provision of Article 11 and therefore any order of detention would not be valid.

It was argued by the learned Senior Federal Counsel on behalf of the respondents that the order of detention is necessary to prevent an act prejudicial to the security of the country. The Minister having been satisfied that the applicant's act is prejudicial to the security of the country, that decision, based on the subjective test, cannot be challenged in Court. With respect I do not agree with his argument. The Court is not challenging or questioning the facts of the case. The allegations of fact upon which the subjective satisfaction of the Minister is based are not open to challenge or judicial review. The Court is looking into the grounds of detention to consider whether they fall within the scope of the law which are open to challenge. It is obvious that the grounds as stated in the order are outside the scope of Article 149 of the Constitution. Consequently the order of detention upon the grounds inconsistent with Article 11 of the Constitution is outside the purview of the Internal Security Act and therefore not valid.

For the above reasons I would allow this application.

Also found at [1989] 1 CLJ 448